

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NATIONAL ORGANIZATION ON	:	
DISABILITY, et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
MARGARET M. TARTAGLIONE,	:	
et al.	:	NO. 01-1923

MEMORANDUM

Padova, J.

October , 2001

Plaintiffs, organizations who advocate for the disabled, membership organizations of persons with disabilities, and disabled individuals, filed this action on April 19, 2001. The Amended Complaint alleges that the Commissioners of the City of Philadelphia in charge of elections and the purchase of voting machines, the City of Philadelphia, the Philadelphia Board of Election, and the Secretary of the Commonwealth of Pennsylvania have violated Plaintiffs' civil rights under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132 (1994), and Section 504 of the Rehabilitation Act of 1973 (the "Rehabilitation Act"), 29 U.S.C. § 794(a) (1994), by denying them equal and integrated access to polling places and accessible voting machines.¹ Before the

¹Plaintiffs' initial Complaint alleged claims only against the City Commissioners. On October 10, 2001, the Court dismissed the claims brought by the visually impaired Plaintiffs, without prejudice, for failure to join an indispensable party pursuant to Fed. R. Civ. P. 12(b)(7). Plaintiffs filed an Amended Complaint on October 15, 2001, naming, as additional parties, the City of Philadelphia, the Philadelphia Board of Election and the Secretary of the Commonwealth of Pennsylvania.

Court is Plaintiffs' Motion for Class Certification. For the reasons which follow, the Motion will be granted.

I. BACKGROUND

There are nine individual Plaintiffs who have either visual or mobility impairments who seek to represent a class of similarly situated disabled voters. The visually impaired Plaintiffs, Denice Brown, Patrick Comorato, Suzanne Waters, Suzanne Erb, and Fran Fulton, are all legally blind. The mobility impaired Plaintiffs, Jesse Jane Lewis, Theresa Yates, Julia Campolongo, and Karin DiNardi, use wheelchairs to ambulate. There are also four organizational Plaintiffs, National Organization on Disability, Liberty Resources, Inc., Pennsylvania Council of the Blind, and the National Federation of the Blind of Pennsylvania.

Plaintiffs allege that Defendants have discriminated against them in the voting process in violation of the ADA and the Rehabilitation Act by purchasing new electronic voting machines which are not accessible or independently usable by visually disabled voters. Plaintiffs further allege that Defendants have discriminated against them by failing to select accessible polling places or modify polling places to make them accessible to persons with mobility impairments. Plaintiffs seek injunctive relief on behalf of themselves and a class of similarly situated voters.

Plaintiffs seek certification of a class made up of the following subclasses: (1) registered voters of Philadelphia County

who have mobility impairments which prevent them from voting in inaccessible neighborhood polling places; and (2) blind or visually impaired voters who are unable to read or use election ballots which have not been adapted for persons with visual impairments. (Am. Compl. ¶ 25.) The proposed Class comprises approximately 184,000 individuals, slightly more than one-half of whom are visually impaired. (Am. Compl. ¶ 26.)

II. LEGAL STANDARD

To obtain class certification, Plaintiffs must meet all four requirements of Federal Rule of Civil Procedure 23(a) and at least one part of Federal Rule of Civil Procedure 23(b). Baby Neal v. Casey, 43 F.3d 48, 55 (3d Cir. 1994) (citing Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239 (3d Cir. 1975)). When doubt exists concerning certification of the class, the court should err in favor of allowing the case to proceed as a class action. Gaskin v. Commonwealth of Pa., No. 94-CV-4048 (E.D. Pa., July 24, 1995), 23 IDELR 61 (citing Eisenberg v. Gagnon, 766 F.2d 770, 785 (3d Cir. 1985)). The four requirements of Rule 23(a) are satisfied only if:

1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

Plaintiffs allege that the proposed class is maintainable pursuant to Federal Rule of Civil Procedure 23(b)(2) which requires that: "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). Defendants argue that class certification should be denied because Plaintiffs do not satisfy the third and fourth requirements of Rule 23(a) relating to the adequacy of the class representatives and the typicality of their claims.

In determining whether the class should be certified, the Court examines only the requirements of Rule 23 and does not look at whether the Plaintiffs will prevail on the merits. Eisen v. Carlisle & Jacquelin, 417 U.S. 157, 177-78 (1973) ("In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.") (citations omitted). However, the Court must also "carefully examine the factual and legal allegations" made in the Complaint. Barnes v. American Tobacco Co., 161 F.3d 127, 140 (3d Cir. 1998).

Rule 23(c)(4)(B) provides "that a class may be divided into subclasses and each subclass treated as a class." In this case, the Plaintiffs seek to divide the class into two subclasses

because of the differences in the facts and circumstances of the visually and mobility impaired Plaintiffs and the relief they seek.

III. DISCUSSION

A. RULE 23(a)

1. Numerosity

The Amended Complaint alleges that the class numbers approximately 184,500 persons with visual and mobility impairments. (Am. Compl. ¶ 26.) There is no minimum number necessary to satisfy the numerosity requirement. See Moskokwitz v. Lopp, 128 F.R.D. 624, 628 (E.D. Pa. 1989). The statute does not require "any particular number or require that joinder of all members be impossible, so long as a good faith estimate of the number of class members is provided." Stewart v. Associates Consumer Discount Co., 183 F.R.D. 189, 194 (E.D. Pa. 1998). The Court may use common sense assumptions to support a finding of numerosity. Id. Common sense dictates that where the class numbers in the thousands that "joinder of all would be impracticable and that the numerosity requirement has been satisfied." Id. The size of the proposed class makes joinder impracticable and, consequently, the numerosity requirement is met in this case.

2. Commonality

"The commonality requirement is satisfied if the named plaintiff shares at least one question of fact or law with grievances of the prospective class. Classes seeking injunctive

relief 'by their very nature often present common questions satisfying Rule 23(a)(2).'" Duffy v. Massinari, No.Civ.A. 99-3154, 2001 WL 683802, at *4 (E.D. Pa. June 15, 2001) (citing Baby Neal v. Casey, 43 F.3d 48, 56 (3d Cir. 1994)). Plaintiffs assert that the named Plaintiffs and the proposed subclass members have the following questions of law or fact in common: "whether Defendants violated the Americans with Disabilities Act . . . and Section 504 of the Rehabilitation Act . . . by failing to ensure that voters with mobility or visual impairments have access to neighborhood polling places and voting machines that are independently usable by blind or visually impaired persons." (Pls.' Mem. at 6.) The alleged discriminatory acts of Defendants are the same with respect to the named Plaintiffs and the subclasses they seek to represent. As Plaintiffs seek injunctive relief against Defendants, who are allegedly engaged in a common course of conduct on a classwide, or subclass wide, basis, the commonality requirement is met in this case. T.B. v. School Dist. of Philadelphia, No.Civ.A. 97-5453, 1997 WL 786448, at *4, (E.D. Pa., Dec. 1, 1997).

3. Typicality

"A plaintiff's claim is typical if it arises from the same event or course of conduct that gives rise to the claims of other class members and is based on the same legal theory." T.B. v. School Dist. of Philadelphia, 1997 WL 786448, at *4 (citing Pascal v. Heckler, 99 F.R.D. 80, 83 (E.D. Pa. 1983)). A plaintiff's claim

can be typical even if the named plaintiff's individual circumstances are "markedly different" from that of the class. Duffy, 2001 WL 683802, at *5. The named Plaintiff's claims need only be sufficiently similar to those of the class to allow the court to conclude that "(1) the representative will protect the interests of the class and (2) there are no antagonistic interests between the representative and the proposed class." Id.

Plaintiffs assert that the claims of the named Plaintiffs are typical of those of the subclasses because they are adversely affected by the unlawful conduct of the Defendants in the same way. (Pls.' Mem. at 9.) The claims of the proposed subclass of visually impaired voters and the claims of the visually impaired Plaintiffs arise from the same facts - the failure of Defendants to purchase electronic voting machines with audio output technology - and are based on the same legal theory - that Defendants' conduct violates the ADA and the Rehabilitation Act. The claims of the proposed subclass of mobility impaired voters and the claims of the mobility impaired Plaintiffs also arise from the same facts - the failure of Defendants to select neighborhood polling places which are accessible to voters who use wheelchairs - and are based on the same legal theory - that Defendants' conduct violates the ADA and the Rehabilitation Act.

Defendants argue that the Motion for Class Certification should be denied because the claims of the named Plaintiffs are not

typical of the claims of the subclasses they represent. Defendants argue, without citing any supporting evidence, that some visually impaired voters who can read large type may be able to use the electronic voting machines recently purchased by the City, because those machines can enlarge the typeface. Defendant also argue, again without citing any supporting evidence, that not all mobility impaired voters are assigned to inaccessible polling places, and therefore, the claims of the named Plaintiffs would not be typical of the claims of those voters. Defendants further argue that the named Plaintiffs are not typical because they are subject to unique defenses because some of them have voted and two of them, Lewis and Erb, are members of the Mayor's Commission on People with Disabilities. However, "[R]ule 23(a)(3) requires typicality of the named plaintiffs' claims, not defenses that may be raised." Fitch v. Radnor Industries, Ltd., No.Civ.A. 90-2084, 1990 U.S. Dist. LEXIS 13568, at *11 (citing In re Mellon Bank Shareholders Litigation, 120 F.R.D. at 37-38).

The claims of the individual Plaintiffs and the members of the proposed subclasses are typical in that they challenge the same course of conduct by Defendants: the failure to purchase accessible voting machines and the failure to select accessible polling places or modify polling places to make them accessible. The potential factual differences mentioned by Defendants are too slight to warrant a finding that the proposed subclasses of visually

and mobility impaired voters do not satisfy the typicality requirement and, therefore, the typicality requirement is satisfied in this case. T.B. v. School Dist. of Philadelphia, 1997 WL 786448, at *5.

4. Adequacy of representation

"To establish adequate representation, (a) the plaintiff's attorney must be qualified, experienced and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class." T.B. v. School Dist. of Philadelphia, 1997 WL 786448, at *5. Plaintiffs assert that their counsel, Tom Earle and Steve Gold, have ten and thirty years of experience, respectively, in federal court class actions and disability rights. They have also litigated numerous class actions to enforce the ADA and the Rehabilitation Act. Plaintiffs also assert that the named Plaintiffs will fairly and adequately protect the interests of the class and have no interests which conflict with other class members.

Defendants argue that the Motion for Class Certification should be denied because the interests of the named Plaintiffs conflict with the interests of the members of the subclasses. Defendants claim that the interests of visually disabled Plaintiffs who seek to prevent the City from using the electronic voting machines it has already purchased conflict with the interests of the class of mobility impaired voters because the new voting machines

are accessible to the disabled. They also argue that the interests of the mobility impaired Plaintiffs in moving polling places to accessible locations conflict with the interests of the class of the visually impaired who might have to travel greater distances to vote. Defendants also argue that, because of these purported conflicts, the same attorneys would not be able to conduct the proposed litigation on behalf of both subclasses.

The Court finds that Plaintiffs' counsel are qualified, experienced and generally able to conduct the proposed litigation. The Court further determines that the potential conflicts between the interests of the proposed subclasses are insubstantial and do not constitute interests which are antagonistic and which would prevent the named Plaintiffs from adequately representing the subclasses they seek to represent. Therefore, the adequacy of representation requirement of Rule 23(a) is met in this case.

B. Rule 23(b)(2)

As the Plaintiffs have met the requirements for certification of the proposed class pursuant to Rule 23(a), the Court must examine whether certification is appropriate under at least one part of Rule 23(b). Plaintiffs seek to have this class certified pursuant to Rule 23(b)(2) because Defendants have "acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief . . . with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2).

Section (b)(2) was "designed specifically for civil rights cases seeking broad declaratory or injunctive relief for a numerous and often unascertainable or amorphous class of persons." T.B. v. School Dist. of Philadelphia, 1997 WL 786448, at *6. The Amended Complaint seeks class wide injunctive relief to remedy Defendants' alleged discrimination against the subclasses of visually and mobility impaired voters. The Court finds, therefore, that certification of the proposed subclasses pursuant to Rule 23(b)(2) is appropriate.

IV. CONCLUSION

For the reasons stated above, the Court concludes that Plaintiffs have met the requirements for certification of the class pursuant to Federal Rule of Civil Procedure 23. Accordingly, the Court certifies the proposed Plaintiff class for the purpose of seeking injunctive relief pursuant to Rule 23(b)(2). An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NATIONAL ORGANIZATION ON	:	
DISABILITY, et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
MARGARET M. TARTAGLIONE,	:	
et al.	:	NO. 01-1923

O R D E R

AND NOW, this day of October, 2001, in consideration of Plaintiffs' Motion for Class Certification (Docket No. 15), Defendants' response thereto and Plaintiffs' reply memorandum of law, **IT IS HEREBY ORDERED** that the Motion for Class Certification is **GRANTED** and the class shall comprise the following two subclasses:

(1) all mobility impaired individuals, including those that use a wheelchair to ambulate, and who are registered to vote in the City of Philadelphia; and

(2) all blind or visually impaired individuals who are registered to vote in the City of Philadelphia.

BY THE COURT:

John R. Padova, J.